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SUPREME COURT NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

ERNEST L. CITRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION

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Petitioner ERNEST L. CITRON prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Sixth Circuit entered on April 28, 1981, affirming Petitioner's conviction for income tax evasion.

1. QUESTIONS PRESENTED FOR REVIEW

a) Whether the District Court erred in denying Petitioner's Motion for Suppression of Evidence given the unauthorized appropriation and use of statutory authority by the examining Revenue Agent for the purpose of conducting a non-tax search of private papers in violation of Constitutional rights guaranteed by the Fourth and Fifth Amendments.

b) Whether the District Court erred in denying Petitioner's Motion for Suppression of Evidence given the use of deception by the examining Revenue Agent, which thereby vitiated Petitioner's consent to the search and violated the claimed statutory authority for the search as well as Petitioner's Constitutional rights guaranteed by the Fourth and Fifth Amendments.

c) Whether the District Court abused its discretion in denying

Petitioner's Motion for Rehearing since that ruling prevented Petitioner from examining a crucial witness whose apparent importance to the resolution of the case was not revealed until the prosecution's key witness gave trial testimony which contradicted prior testimony he had given.

d) Whether the District Court erred when it found that Petitioner had consented to the removal of crucial evidence from his business premises by the examining Revenue Agent, since the only evidence relied on in that finding was the testimony of the Agent, which was inconsistent, unreliable, and contradicted by other creditable evidence.

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4. OPINIONS BELOW

Petitioner ERNEST L. CITRON was indicted in a three count indictment returned on August 17, 1977, by the Federal Grand Jury for the Eastern District of Michigan, Southern Division. He was charged with having willfully and knowingly attempted to evade the payment of federal income tax for the years 1970, 1971, and 1972 in violation of Section 7201, Title 26, United States Code. Petitioner was tried and convicted in the United States District Court for the Eastern District of Michigan, Southern Division, before the Honorable John Feikens, Chief Judge, sitting without a jury. Petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit; that Court issued an opinion affirming Petitioner's conviction on April 28, 1981.

5. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). Petitioner's conviction was affirmed by the United States Court of Appeals for the Sixth Circuit on April 28, 1981, and this Petition is timely filed within 60 days thereafter pursuant to Supreme Court Rule 20.1.

6. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated..."

Fifth Amendment to the Constitution of the United States: "[N] or shall any person...be deprived of life, liberty, or property, without due process of law..."

26 United States Code 7602: "For the purpose of ascertaining the correctness of any return...the Secretary is authorized (1) to examine any books, papers, records, or other data which may be relevant or material to such inquiry..."

7. STATEMENT OF THE CASE AND FACTS:

Petitioner was convicted in a Federal bench trial of a violation of 26 U.S.C. 7201 on the basis of documentary evidence that was admitted over petitioner's objection. This petition draws into question the use of the audit examination power granted to the Secretary of the Treasury by a governmental agent who acted in a deceptive manner.

Because the sequence of event in this matter is crucial to an understanding of the issues presented by this petition, the facts are set out in detail below.

The investigation that led to indictment of Petitioner, Ernest L. Citron (hereinafter "Citron") began in 1973. At that time Revenue Agent William Engelson, a civil tax examiner for the Internal Revenue Service, was participating in the Narcotics Traffickers Program. Specifically, he had been assigned to assist Special Agent Thomas Kraft, a criminal investigator, in the tax fraud investigation of Tako Peshkopia, a suspected low-level narcotics dealer. Citron came to the attention of the agents during that investigation. The agents learned that Citron, an attorney, had previously represented Peshkopia. They further determined that Citron had purchased a beauty shop from Peshkopia and that Peshkopia had been observed driving Citron's automobile. The agents discussed Citron as a possible third party

contact in aid of the Peshkopia investigation, but Kraft decided a contact would not be worth the "...government's time and money" 1/ Apparently without Kraft's knowledge or consent, Engelson began an investigation of Citron's financial affairs. He obtained Citron's bank records and determined that approximately $200,000 had been deposited and withdrawn from the beauty shop account over a six month period. Engelson testified that, although he did not at that time suspect tax fraud, he had formed the suspicion Citron was engaged in illegal narcotic activity.

Acting on this suspicion, he initiated a contact with Citron. During the evidentiary hearing, Engelson testified that he was acting "strictly on my own." In his affidavit filed with the

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1/ Citations to the record have been omitted at this stage in the interest of maintaining the preliminary appendix at a reasonable size.

Trial Court, he stated that he had been "assigned" the audit examination of Citron's tax returns. He later conceded, "I may have misused the word." During the trial, he testified that he had discussed the Citron matter with his supervisor.

On cross examination Engelson testified that he did not recall discussing Citron with Special Agent Kraft, the head of the Peshkopia investigation. He also testified that he was not in contact with the Drug Enforcement Administration, the Department of Justice, or with the United States Attorney's Office. Engelson's first contact with Citron was a telephone call placed on September 5, 1973. Agents Engelson and Kraft met for several hours on the morning of that day concerning the Peshkopia investigation; however, Kraft testified that he did not recall any

discussions with Engelson regarding Citron. On direct examination by the Court he testified that "I may have mentioned something to [Kraft]." Kraft maintained throughout his testimony that he was totally unaware of Engelson's activities with respect to Citron.

Purpose of Inquiry

The testimony of Engelson concerning the purpose of the inquiry may fairly be divided into three versions: (1) Pre-Discovery Version; (2) Post-Discovery Version, and (3) Re-Opening Version.

Pre-Discovery Version - "Routine Audit"

During the subsequent tax fraud investigation, Citron learned that Engelson had made complete sets of copies of his books and records. On April 25, 1977, he filed a Pre-Indictment Motion for Return of

Property. Citron claimed that substantially all of his books and records had been taken from his business office without permission, and sought the return of the photographically-reproduced copies of those records. Engelson testified that he had received permission to remove the records. He further testified that he had offered to give receipts for the records, but had not issued the for.[illegible]. The evidentiary hearing was held over a period of two days; Judge Churchill heard the testimony of both Engelson and Citron. On August 3, 1977, he declined to exercise jurisdiction, holding that, since both Engelson and Citron gave credible testimony, the question of consent to remove records was "very, very close", and therefore the court ought not exercise jurisdiction or grant relief unless there had been a clear violation of the claimant's constitutional rights.

The information concerning the relationship of the Citron case to the Peshkopia investigation was not made available by the government before or during that proceeding. On cross examination Engelson was asked, in view of the extensive copying, if he had conducted an "In Depth Audit" of Citron's books and records. Engelson testified. "As far as I was concerned it was just a routine audit". On direct examination by the Court, he testified that he was "not necessarily" suspicious of Citron at the time of the audit.

Post-Discovery Version - "Third Party Audit"

Discovery made available to Citron the transmittal report authored by Engelson, which described the background of the case. In that report Engelson stated the following:

> "Thinking that these [bank] funds were 'tainted' or might have stemmed from narcotic activities, Mr. Citron's tax returns for the years 1970 thru [Sic] 1972 were requisitioned as a related case to [Peshkopia]."

At that point Engelson revealed that he had developed a "suspicion" that Citron could have been the finance man for Peshkopia; that Citron was "...where [Peshkopia] was getting his money from." On direct examination by the Court he testified that at the time of the initial contact he was "not interested" in Citron's returns. Engelson testified that until his suspicions were "...proven otherwise... I had to give the taxpayer every opportunity to show why a quarter of a million or $220,000 was going in and out, the source of the money". However, Engelson did not disclose his suspicions to Citron.

Citron argued that at the time of the initial contact he was the target of a criminal inquiry, unrelated to the tax

audit. Engelson's position was that his "primary purpose" was to obtain information in connection with the Peshkopia investigation and that he had not told Kraft. The Court pursued Engelson's explanation and encouraged him to "think hard" on the question of whether he had communicated with Kraft. Engelson responded that he "may have mentioned something".

When Engelson was asked why he did not advise Citron of the facts underlying the contact, he testified that he could not reveal that information because of the narcotics investigation of Peshkopia. When it was established that there was no such investigation at the time of the initial contact, he recanted and said that he did not want to reveal the existence of the tax fraud investigation of Peshkopia. When it was established that normal IRS procedures permitted the agent to reveal the existence

of such an investigation, he subsequently stated he had not done so because "...it would tip my hand and it would make the taxpayer apprehensive and I might not get the books and records that I was seeking."

The evidentiary hearing was closed on April 11, 1978. At that time Engelson's testimony was that the contact with Citron was in the nature of a third party contact which had as its primary purpose the development of information to assist the Peshkopia investigation.

On May 3, 1978, Citron filed a Supplemental Brief containing the relevant portions of the Internal Revenue Manual which describe the respective responsibilities of a Special Agent and Revenue Agent in conjunction with a joint tax fraud investigation, and argued that Engelson's explanation was totally implausible.

Re-Opening Version - "Dual Purpose"

On July 11, 1978, at the government's request and over Citron's objection the evidentiary hearing was reopened. At that hearing Engelson testified that at the time of the initial contact he had two purposes (1) to find out information about Peshkopia, and; (2) to perform a civil audit of Citron's tax returns.

Court's Opinion

On November 29, 1978, in its Opinion (App. 18) the Court denied Citron's Motion for the Suppression of Evidence based upon a finding that Engelson had a legitimate purpose at the time he contacted Citron, i.e. to determine the correctness of the tax returns, and the fact that he may also have suspected that "there might be some narcotic activity did not make the examination illegal." This opinion also

included a finding that Engelson did not engage in trickery or deception and that the audit had been conducted within the scope of the consent given by Citron. The court denied Citron's renewed Motion using similar language on June 19, 1980, (App. 32).

Trial

Citron was convicted of a violation of 26 U.S.C. 7201 on June 19, 1980.

Appeal

Citron's conviction was affirmed by the Sixth Circuit Court of Appeals on April 28, 1981. (App. 57).

8. LAW AND ARGUMENTS

a) WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION FOR SUPPRESSION OF EVIDENCE GIVEN THE UNAUTHORIZED APPROPRIATION AND USE OF STATUTORY AUTHORITY BY THE EXAMINING REVENUE AGENT FOR THE PURPOSE OF CONDUCTING A NON-TAX SEARCH OF PRIVATE PAPERS IN VIOLATION OF CONSTITUTIONAL RIGHTS GUARANTEED BY THE FOURTH AND FIFTH AMENDMENTS.

LAW

The basic protection afforded by the Fourth Amendment was stated succinctly in Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967): "The basic purpose of this Fourth Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (emphasis added)

The essence of Argument One is this: Who shall have the power to

decide when a citizen's right to privacy must yield to the right of governmental inspection? The Supreme Court has made it perfectly clear that the individual government field agent does not possess the discretionary authority to invade privacy. The Camara Court spoke directly on this point; 387 U.S. 523, 532: "The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."

Thus the warrant requirement with its procedural regularity has been interposed between the government and the citizen. But even in the situation where warrantless searches are authorized, the procedural and supervisory components of such authorization must be

respected; otherwise, "...the authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." Secretary of Labor v. Barlow's, 436 U.S. 307, 320 (1978).

Enforcement of the tax law as an activity of government is not exempt from the strictures of the Fourth Amendment. G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977). Since IRS employees enjoy no special dispensation from the Fourth Amendment, they must rely on statutory authority when conducting warrantless searches, i.e., audit examinations. Congress has recognized the inappropriateness of the warrant requirement in the routine tax audit situation by enacting 26 U.S.C. (hereinafter "I.R.C.") § 7602. This provision authorizes the Secretary of the Treasury to

examine books and records and to issue summonses to compel their production without the necessity of obtaining a warrant.[2/] It is essential to note how

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2/ I.R.C. § 7602 reads as follows:

SEC. 7602 EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

narrowly drawn this authority is; only specified tax-related matters are proper objects for its exercise.

The limited scope of § 7602 is also emphasized by the nature of its operative provisions. The target taxpayer's consent is a prerequisite to the exercise of the examination authority; the IRS must issue a summons to the non-cooperative taxpayer. Such a summons is not self-enforcing, in that the IRS must seek judicial enforcement if the taxpayer chooses to disobey it. The clear purpose of these limitations and safeguards is to foreclose arbitrary, abusive exercises of the statutory authority.

FACTS AND ANALYSIS

The search carried out by Revenue Agent Engelson of Citron's personal books and records was an objectionable misuse of statutory authority because it was arbitrary, unsupervised, and for an improper purpose.

1) Arbitrariness: Engelson, while his testimony was subject to change during the course of the various evidentiary hearings held by the trial court, maintained during the bulk of his testimony that he had initiated the inquiry with Citron by requisitioning his tax returns. For example, he testified that the contact with Citron was "strictly on my own." In its opinion denying Citron's Motion to Suppress Evidence, the trial court, quoting Engelson in part, found: "'[T]hinking that these records were tainted or might have stemmed from some narcotic activity', Engelson requisitioned Citron's returns for 1970, 1971, and 1972" (App. 19). It is clear that Engelson was acting on his own personal suspicions. This is

firmly established by his testimony:

> The Court: If you had not had that suspicion [narcotics activities] you wouldn't have conducted the audit, would you?
>
> The Witness: I wouldn't have requisitioned the return.
>
> The Court: That's what led you to Mr. Citron?
>
> The Witness: That's correct, your honor.

At trial, Engelson testified that the decision to investigate Citron was his own.

(2) Supervision: As pointed out in the preceeding paragraph, Engelson initiated the audit on his own personal suspicion. He testified that he had no contact with his supervising Special Agent prior to the audit. Notable by its absence from the evidentiary hearings is any reference to contact by Engelson with supervisory personnel

of the IRS in connection with the decision to examine Citron's personal books and records.

At trial, Engelson changed his testimony. He seems to have said that he discussed the matter with one Ted Eckhardt, his supervisor. Whether this alleged discussion amounted to more than the initialing of requisition forms is unclear because the trial court would not allow Citron a rehearing to explore this crucial contradiction. Because of this denial, the exact nature of his supervisory capacity in the audit of Citron is unclear. It is submitted that, as far as the record shows, Engelson conducted the audit without any meaningful supervision by IRS executive personnel.

(3) Improper Purpose: Engleson testified on numerous

occasions that he was uninterested in tax-related matters at the inception of the audit.

a) T-Letter: "[T]hinking that these records were tainted or might have stemmed from some narcotics activity..."

b) Motion to Suppress,

The Court: That's what led you to Mr. Citron?

Engelson: That's correct your honor.

The Court: The fact that you believed that some of his money was tainted with narcotics activities, right?

Engelson: Initially, yes.

c) Rehearing,

Q. (Prosecuting Attorney): Mr. Engelson, do you understand that we are concerned with understanding where your focus was when you did this investigation. Do you understand that, sir?

A. (Engelson): Yes, sir.

Q. Were you concerned about uncovering information, if possible, about Tako Peshkopia?

A. Since I was in the midst of his examination - yes I would be.

Q. Would it also be true that you were interested in Ernest Citron because of your suspicions and concerns about his possible involvement or possible criminal activity?

A. Yes, sir.

It is manifest from the Agent's testimony that the decision to contact Citron was predicated upon a personal suspicion of possible involvement in criminal activity. This activity must be distinquished from an arguably permissible criminal purpose - tax fraud. Engelson specifically denied that at the time of the initial contact he had had a belief that Citron had committed tax fraud, as follows:

Q. (Mr. Siegel): Mr. Engelson, is it correct to say that during the course of a tax

audit of a third party, that you discovered something in the order of $220,000 or more going into Mr. Citron's checking account that caused you to initially requisition the returns?

A. (Engelson): That's correct.

Q. And at that point did you think that Mr. Citron had committed tax fraud?

A. No, sir.

SUMMARY

The audit search of Citron's private books and records was an unauthorized appropriation and use of the statutory authority granted under I.R.C. § 7602. Engelson testified that his personal suspicions prompted the contact with Citron. During the evidentiary hearings, no evidence was introduced by the government which in any way established procedural or supervisory justification for Engelson's conduct. It is clear no such evidence exists. The motivating factor behind the initiation of the audit examination was Engelson's belief

that Citron was engaged in illegal narcotic activity; a belief that he was the "finance man" behind Peshkopia. Engelson utilized the audit authority as a pretext or guise to gain entry to the premises and access to the records, so as not to "tip his hand" about his purpose to conduct a search for evidence of tax-unrelated criminal activity. No evidence of institutional review or supervisory control is on the record. The decision to contact Citron lacked the procedural safeguards mandated by the Fourth Amendment and otherwise imposed by Congress in the enactment of I.R.C. § 7602. Hence, Engelson had no legal authority to initiate and conduct the search of Citron's private papers and, therefore, the search was illegal.

The trial court neither confronted nor decided this important issue, although it was submitted and argued at length. By avoiding this issue, the

trial court implicitly sanctioned this conduct and permitted its fruits to be admitted as evidence against Citron. This failure was clearly erroneous. That error was material and prejudicial as the evidence from that examination constituted the primary proof in the prosecution's case.

b) WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION FOR SUPPRESSION OF EVIDENCE GIVEN THE USE OF DECEPTION BY THE EXAMINING REVENUE AGENT, WHICH THEREBY VITIATED PETITIONER'S CONSENT TO THE SEARCH AND VIOLATED THE CLAIMED STATUTORY AUTHORITY FOR THE SEARCH AS WELL AS PETITIONER'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FOURTH AND FIFTH AMENDMENTS.

LAW

It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue Agent. United States v. Rothstein, 530 F.2d 1275 (5th Cir. 1976); United States v. Ponder, 444 F.2d 816 (5th Cir. 1971), cert. denied 405 U.S. 918, (1972); United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970) cert. denied, 400 U.S. 831, (1970). As all parties agree: "It is equally clear that he (Engelson) may not induce consent to examine records by

trickery or misrepresentation." (App. 9). The Sixth Circuit said in United States v. Marra, 481 F.2d 1196, 1199 (6th Cir. 1973):

> "Without extended discussion, we set out the controlling law as to what must be shown to warrant a finding that a taxpayer has been tricked or deceived by government agents into providing incriminating evidence to such agents. In United States v. Prudden, (supra), the rule is given ...."

The Prudden court stated the following regarding silent misrepresentations:

> "Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading."

A Revenue Agent need not explain all the potential ramifications of a routine audit to the taxpayer in the absence of circumstances which render silence misleading, (e.g. Prudden, Marra), but the use of misleading or deceptive statements is not permitted. United States v. Tweel, 550 F.2d 297

(5th Cir. 1977). In Tweel a Revenue Agent's truthful statement that no Special Agent (criminal investigator) was involved in the case was held to be so deceptive as to vitiate the taxpayer's subsequent consent to the audit. This was because the representation that the inquiry was "routine" and nothing more was deemed deceptive when in fact it had been requested by a criminal branch of government, namely the Organized Crime Strikeforce. Citing Prudden and remanding, the court said:

> From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky, deliberate deception by the agent under the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material. Any findings to the contrary under the facts of this case are clearly erroneous. (citations omitted). Tweel at 300.

On the other hand, decisional law has recognized that our tax laws are a law enforcement system in which the

criminal and civil elements are inherently intertwined. Assuming that an audit is assigned to a revenue agent through the normal procedural channels, the initial dual purpose does not impress upon the examining agent the obligation to give a Miranda-type warning or its equivalent. The civil examiner need not inform the taxpayer that if evidence of tax fraud is uncovered a criminal prosecution may ensue.

The fundamental difference between these non-abusive situations on one hand and Tweel and the present controversy on the other is conscious deception. While a Revenue Agent need not inform the taxpayer of every possibility, he is absolutely precluded from practicing deception in order to gain consent to the examination. In the instant case the trial court recognized this important distinction at a superficial level, but failed to come satisfactorily to

grips with the vital issue of deception. This is most graphically demonstrated by its reliance in denying Citron's motion on the summons cases under IRC § 7602, in particular United States v. LaSalle National Bank, 437 U.S. 298 (1979). LaSalle and the summons cases cited by the court are cases of statutory interpretation as it relates to the IRS Summons authority. They do not place in issue the question of deception and the illegal appropriation of the statutory authority to gain access to private papers for criminal purposes unrelated to the administration of the tax laws.

FACTS AND ANALYSIS

The Court's opinion denying Citron's motion was predicated upon a finding that Engelson possessed a dual purpose at the time of the initial contact with Citron: First, to determine the correctness of Citron's tax returns, and;

second, to further the Peshkopia investigation. This finding is unsupported by the facts of this case.

INITIAL INQUIRY WITH CITRON WAS UNRELATED TO THE PESHKOPIA TAX INVESTIGATION AND HAD AS ITS PRIMARY PURPOSE A SEARCH FOR EVIDENCE LINKING CITRON WITH NARCOTIC TRAFFICKING

The truth is that Engelson's contact with Citron was unrelated to the Peshkopia tax fraud investigation. Peshkopia's conviction and incarceration in April 1973 substantially eliminated the prosecution potential of the tax fraud case. Engelson's Superior, Kraft, emphasised that factor in his final report recommending that the case be terminated. If there existed an extraordinary reason to contact Citron in order to advance the criminal case, why was Kraft not aware of it? He had

considered contacting Citron and concluded that it was not worth the "government's time and money." Further, Kraft was in charge of the Peshkopia case. Engelson said he wanted to determine where Peshkopia "was getting his money from." That is not a tax inquiry; it is an inquiry more suggestive of a narcotics investigation directed against Citron. Consider; is it likely that the government would utilize the testimony of an attorney-narcotics financier to convict a street peddler; or is the reverse more probable? Engelson's testimony on this issue is not worthy of belief. The truth is that Engelson utilized the Peshkopia tax case as a ruse to obscure the fact Citron was the real target of the criminal inquiry. Engelson conducted a fishing expedition. He was "not interested" in Citron's tax returns; he was interested in connecting Citron with narcotic trafficking.

Engelson searched Citron's records to uncover a broader pattern of illegal activity.

CITRON INQUIRY DISTINGUISHED FROM AUDIT OF PERSON INVOLVED IN ILLEGAL ACTIVITY

It is arguably permissible for the IRS to audit individuals engaging in illegal activities. Illegal activities generally give rise to unreported income. That, however, is not the Citron case. Citron was audited by Engelson to determine if he was involved in illegal activities, and that is quite a different question. Engelson didn't know; he acted on mere suspicions. The latter procedure amounts to an arbitrary invasion of privacy and LaSalle bad faith. The tax laws were not intended to be utilized to promote general criminal

investigative inquiry. The investigative authority of the IRS was intended to implement inquiries regarding the accuracy of federal tax returns, not underlying criminality. LaSalle cautioned against the IRS becoming the evidence-gathering agency for other branches of government. The testimony of Engelson clearly indicates that his initial efforts were directed toward finding evidence which placed Citron in illegal activity. He maintained this explanation throughout his testimony. The situation is exacerbated upon a finding that the inquiry was prompted by the mere suspicious of a single agent acting alone and unsupervised. The audit undertaken by Engelson was arbitrary, capricious and a misuse of the statutory authority amounting to bad faith.

ENGELSON ENGAGED IN CONSCIOUS DECEPTION

When the Court asked Engelson why he did not disclose to Citron the "primary purpose" of the inquiry, Engelson sought further refuge behind the Peshkopia ruse. He testified in unequivocal language that he did not disclose the purpose of his inquiry and the nature of his suspicion because of the risk of divulging information concerning the "drug" investigation.

> Q. (Kennan) "Mr. Engelson, the investigation of the third party, "X", (Peshkopia), was that a tax investigation or a drug investigation?
>
> A. It was a drug investigation.

The truth is that there was no such drug investigation.

Engelson had been with the IRS for over thirty years; he knew what he was doing. The real "danger" from Engelson's perspective was that if Citron knew that the real purpose of the investigation was to uncover possible involvement in

narcotics, he never would have consented to the "civil audit." The clear purpose of Engelson's actions was to deceive Citron into allowing an investigation of his books and records so that Engelson could satisfy his suspicions.

CITRON WAS DECEIVED

There is no questions but that Citron was deceived by the misrepresentations of Engelson. The trial court correctly found "...that, when Engelson called upon Citron, Citron was immediately aware of the personal risks accompanying a tax audit." (App. 24). Since he was an attorney and had recently undergone an audit of earlier tax years this is no doubt true and is undisputed. Citron's cooperation with the audit was cited by the trial court as proof that Citron was not effectively deceived. The Court stated: "He (Citron) admits that he permitted Engelson to

take certain peg registers from the office and allowed him the free reign of the office. That being so, I now find it incredible that Citron was in any way misled (assuming it was said) by Engelson's statement that this was a routine audit..." (App. 25)

The appellant submits that the opposite of the trial court's finding is a much more logical analysis of the evidence. It would be incredible that Citron, an attorney, would give the run of his office and records to an agent of the government who was trying to connect him up with an illegal narcotics operation. The fact that Citron was not involved in that operation is irrelevant; one need not be a criminal to be protected by the Fourth Amendment. There is no evidence whatsoever on the record tending to indicate that Citron would have consented to the inquiry had he known of its real purpose.

SUMMARY

The District Court's finding that Citron was not deceived is clearly erroneous. The Revenue Agent's actions, both at the time of the investigation and during the subsequent hearings on the subject, indicate that he planned and carried out a pattern of conduct designed to deceive Citron. Only when the true circumstances of the investigation threatened to become known did he assert a genuine interest in Citron's tax returns. This manufactured assertion is insufficient to render his conduct acceptable. He began the investigation intending to deceive Citron and successfully did so. That deception was a material factor in building the government's against Citron, and constituted a grave violation of Citron's Fourth Amendment rights.

c) WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR REHEARING SINCE THAT RULING PREVENTED PETITIONER FROM EXAMINING A CRUCIAL WITNESS WHOSE APPARENT IMPORTANCE TO THE RESOLUTION OF THE CASE WAS NOT REVEALED UNTIL THE PROSECUTION'S KEY WITNESS GAVE TRIAL TESTIMONY WHICH CONTRADICTED PRIOR TESTIMONY HE HAD GIVEN.

LAW

A trial court judge has, by the very nature of his function, far-reaching control of the proceeding over which he presides. It is not the function of the appeals process to reconsider each of the largely mundane rulings made by a trial judge in the course of a trial. This discretionary authority, however, is by no means absolute. The dynamic guarantees of a fair trial to the accused are of unquestionable precedence. Foremost among these guarantees is the Fifth Amendment requirement of

due process of law, encompassing the concept that "fundamental fairness" must be granted the accused. See e.g., United States v. Herndon, 536 F.2d 1027 (5th Cir. 1976).

This important concept is also recognized in the Federal Rules of Evidence (hereinafter FRE) and Criminal Procedure (FRCrP). FRE 401-403 define the concept of relevance in federal proceedings, and direct that relevant evidence shall be admitted unless a specialized circumstance, such as prejudice or waste of time, militates against its admission. Likewise, the procedure to be followed in a FRCrP 41(e) Motion for Return of Property requires the presiding judge to "...receive evidence of any issue of fact necessary to the decision of the motion." FRCrP 41(e). Citron's initial Pre-Indictment Motion was analagous to

FRCrP 41(e), and was so treated. Regardless of the nomenclature chosen to describe the motion, the direction to the presiding judge to consider all relevant evidence is entirely appropriate to the instant case.

FACTS AND ANALYSIS

The evidence which Citron sought leave to explore related to the important issue of the circumstances surrounding the initation of the examination of his books by Revenue Agent Engelson. Since the topic has been extensively discussed in Argument I, recapitulation of the general background will be limited to the most relevant points.

During the hearing on Citron's pre-indictment Motion for Return of Property, Engelson testified that the audit of Citron was a routine, ordinary audit. Since Citron had no inkling of

the underlying purpose of Engelson, i.e. to connect him in narcotic activity with Tako Peshkopia, Citron had no reason to delve into the authorization of the examination at that time.

After the Peshkopia investigation was brought to light by pre-trial discovery, however, Engelson consistently testified that he had acted alone in becoming suspicious and that not even his immediate superior on the Peshkopia investigation, Special Agent Thomas Kraft, had known of his inquiry into Citron's books. Engelson testified:

- Citron's returns were requisitioned rather than assigned in the normal manner.
- He could not recall mentioning the Citron matter to Special Agent Kraft. This lack of contact was corroborated by Kraft.
- The contact with Citron was "strictly on my own".
- He "decided" to do a "civil audit".

- He was "interested" in Citron because of "your (Engelson's) suspicions and concerns about his possible involvement or possible criminal activity."

- He wanted to find out where Peshkopia got his money.

- The decision to investigate was his <u>own</u> decision.

A few minutes after this last testimony, the following exchange ensued:

Q. (by Mr. Krieger) Is it your testimony that Mr. Eckhardt assigned you to conduct an audit of Mr. Citron's tax return?

A. (Engelson) Yes.

....

A. Could I correct my statement?

Q. Sure

A. I wrote a requisition for the years 1970, 1971 and 1972 which Mr. Eckhardt then approved.

....

A. I took the requisitions because of an assignment.

Citron has raised the issue of deception as it relates to the purpose

of the inquiry and the manner in which that purpose was represented to him. The revelation that an assignment had allegedly been made to Engelson (presumably by his fraud group supervisor, Ted Eckhardt) was a dramatic departure from Engelson's pre-trial testimony and raised profound questions about the fairness of the hearing received by Citron on the pre-trial motions. If Engelson was acting at the direction of higher echelons of the IRS (or perhaps the Justice Department), then the nature of this direction is extremely relevant to both the authorization issue and the deception issue. Any meaningful resolution of these issues must, in fundamental fairness, include an opportunity to examine Mr. Eckhardt. In this regard, Mr. Eckhardt should be made available by way of rehearing to answer the following questions:

1. Did he have pre-examination contact with Engelson concerning Citron?
2. Did he authorize the examination?
3. What was its purpose?
4. Did he possess prior knowledge of Citron?
5. Was he directed to examine Citron by a strike force or other arm of the Justice Department?
6. Did he discuss Citron with the Justice Department or any other agency of government?

SUMMARY

The denial of an opportunity to ask these questions was seriously prejudicial to Citron. For example, if Eckhardt testified that the audit was performed at the request of the Drug Enforcement Adminstration (Justice Department),

Engelson's representation that the audit was routine and similar to the truly "routine" audit Citron had just undergone would have been seriously deceptive. U.S. v. Tweel, 550 F.2d 297 (5th Cir., 1977). (See Argument b). It is not the fault of Citron that these questions were not raised earlier since Engelson did not reveal their foundation (allegation of assignment) until the time of trial.

The trial court's denial of a Rehearing was materially prejudicial and constituted an abuse of discretion. Petitioner's Fifth Amendment right to due process was materially infringed thereby.

d) WHETHER THE DISTRICT COURT ERRED WHEN IT FOUND THAT PETITIONER HAD CONSENTED TO THE REMOVAL OF CRUCIAL EVIDENCE FROM HIS BUSINESS PREMISES BY THE EXAMINING REVENUE AGENT, SINCE THE ONLY EVIDENCE RELIED ON IN THAT FINDING WAS THE TESTIMONY OF THE AGENT, WHICH WAS INCONSISTENT, UNRELIABLE, AND CONTRADICTED BY OTHER CREDITABLE EVIDENCE.

LAW

In determining whether a trial court has erred in admitting evidence over a claim that it had been illegally seized, the factual findings of the trial court will be accepted on appeal unless they are "clearly erroneous." This standard stops far short, however, of requiring the validation of such findings on appeal without careful examination. See e.g. United States v Mathis, 298 F.2d 790 (6th Cir. 1962), 2 Wright, Federal Practice and Procedure, Criminal § 678 (1969). The instant case presents a clear example of the kind of

clearly erroneous finding that must collapse under the most cursory examination of its underpinnings.

FACTS AND ANALYSIS

The prosecution's attempt to meet the burden of proof on its claim that Citron had consented to the removal of his cash receipts journal rested solely on the shoulders of Revenue Agent Engelson. The issue in essence was a conflict between Engelson, who claimed that consent had been given to the removal of any and all records, and Citron, who testified that while consent had been given to the removal of certain records, for a limited purpose and time, it had been neither given nor requested in the case of the cash receipts journal.

In choosing to believe Engelson's unsubstantiated version of events, the trial court chose to ignore two highly probative circumstances: 1) Engelson's

failure to give document receipts for the removed records in violation of IRS Procedures, and; 2) Engelson's credibility.

1. Failure to give document receipts. While Engelson's failure to give receipts is not solely determinative of the issue, it strongly suggests that consent was not given. The Internal Revenue Manual, which sets standards for the conduct of IRS Agents, reads as follows at MT 1218-49, approved 3/1/66:

> Removal of books, records and documents to a Service Office.
>
> Books, records and other documents may be removed to a Service Office for examination when the person furnishing them agrees to such action. A receipt shall be issued for books, records and other documents so removed and they should be retained only for such time as may be reasonably necessary, under all circumstances, to effect the purpose for which they were obtained. (emphasis added)

First, as a matter of fact, the issuance of document receipts is a required and standard procedure. Second, it is unreasonable to accept the agents explanation that he considered their issuance discretionary. He testified that he gave receipts: "Only if they request it, or they say it isn't necessary, we do not give receipts." Third, the receipt itself, Form 2725, is intended primarily for the protection of the removing agent; i.e. to forestall just the kind of dispute that is here present. Engelson had been with the IRS for over thirty years. Given his experience, it is inconceivable that he would have risked the entire investigation by failing to give a receipt if consent had actually been given. Finally, the

court in its opinion finds it unlikely that Citron did not give consent, relying on his cooperation with other phases of the audit. Citron submits, given these facts, that logic requires a finding that the lack of receipts strongly indicates that no consent was given.

2. Credibility. It would serve no meaningful purpose to list the total number of inconsistencies in Engelson's testimony. A substantial number of them have been pointed out in this brief, while others are contained in the pleadings, and still others are readily apparent from a casual reading of the transcript. This is in marked contrast to the testimony of Citron which, save for the testimony of Engelson, was uncontradicted.

SUMMARY

The trial court's findings regarding the question of consent to remove the records was clearly erroneous. On the question of consent, Engelson's testimony was totally uncorroborated. The government could not produce the required receipts because they were not issued. Receipts are given for the protection of the agent; why would he not have issued them if he had received consent to remove the records? The trial court felt persuaded by circumstances to infer consent. It is submitted that the cited circumstances are relatively neutral and are equally consistent with a lack of consent. The trial court chose to allow these neutral circumstances to outweigh two highly probative facts. It is a fact that no receipts were given. It is a fact that Engelson testified in a contradictory manner. The trial court's

finding was clearly erroneous and the judgment should be reversed.

9. REASONS FOR GRANTING THE WRIT

The questions presented by Petitioner reflect the fact that the evidence gathered by the Revenue Agent was the result of a warrantless "search." The only justification for such a search on the facts presented is the audit authority granted by statute to the Secretary of Treasury. At issue is the fundamental question of whether this extraordinary power is subject to the strictures of the Fourth and Fifth Amendments. It is submitted that a governmental agent who uses this power for a non-tax related purpose and misrepresents that purpose to the target taxpayer in order to gain consent to the examination violates both the letter and the spirit of the Constitutional prohibition against unreasonable searches

and seizures. The Petition should be granted.

10. RELIEF SOUGHT

WHEREFORE, the reasons set forth above, Petitioner Ernest L. Citron, prays that his Petition for Writ of Certiorari be favorable considered, and granted.

Respectfully Submitted,

Ronald T. Hubbard
Attorney for Petitioner
Member of the Bar
of the Supreme Court
of the United States
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Dated: June 25, 1981

SUPREME COURT NO._____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

ERNEST L. CITRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

Ronald T. Hubbard, being duly sworn, deposes and says that on the 25th day of June, 1981, he did in fact serve three copies of his Appearance and Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, with Appendix, by placing the same in an envelope, postage prepaid, and placing said envelope in a United States Post Office mail box, and addressed as follows:

The Solicitor General
Department of Justice
Washington, D.C. 20530

James K. Robinson, Esq.
United States Attorney
817 Federal Building
Detroit, Michigan 48226

M. Carr Ferguson, Esq.
Assistant Attorney General,
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Ronald T. Hubbard
Member of the bar of the
Supreme Court of the
United States

Subscribed and sworn to
before me this 25th day
of June, 1981.

Thomas H. Bergh, Notary Public
Wayne County, Michigan, acting
in Oakland County. My Commission
expires 6/28/82

Office-Supreme Court, U.S.
FILED
JUN 25 1981
ALEXANDER L. STEVAS,
CLERK

80-2208

SUPREME COURT NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

ERNEST L. CITRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL ACTION
NO: 7-80926
Entered:
November 29, 1978

ERNEST L. CITRON,

Defendant.
_____/

OPINION

Defendant Ernest L. Citron, a lawyer (Citron), was indicted on three counts of tax evasion for filing fraudulent personal income tax returns for the calender years 1970, 1971 and 1972. Following arraignment on the indictment he filed a waiver of his right to a speedy trial and moved for suppression of certain evidence and for the return of certain business records. An extensive

evidentiary hearing was held and voluminous briefs were filed. I am of the opinion, having heard arguments, that Citron's motion for suppression of evidence and return of business must be denied.

I. PRIOR HISTORY

This case began in September 1973 when William A. Engelson (Engelson), a revenue agent of the Internal Revenue Service, requisitioned Citron's tax returns for the calendar years 1970, 1971, and 1972 and began an audit. That audit continued until approximately February 15, 1974, when Engelson, after consultation with his supervisor, referred the case to the IRS Intelligence Division. On February 20, 1974, Citron retained tax counsel. While the record does not specify it is reasonable to conclude that between February 20, 1974, and the date proceedings begain in this

court in 1977, there were numerous conferences between Citron's counsel and the IRS.

What led Citron to this court on August 2, 1977, was his belief that IRS was amassing evidence against him, based upon his tax returns of 1970, 1971 and 1972, which evidence was shortly to be submitted to a federal grand jury to determine whether an indictment should be returned against him. Thereupon, Citron initiated an unusual motion to suppress evidence to return business records and to enjoin further prosecution. His motion was referred to the United States District Judge then in charge of the Miscellaneous Docket, Honorable James P. Churchill.

In an evidentiary hearing, which took place over a portion of two days, Judge Churchill heard the testimony of numerous witnesses, listened to arguments, and studied briefs. Judge

Churchill was obviously troubled with this motion in pre-indictment form since it involved the claimed seizure of evidence. In denying relief he pointed out that the case law indicated that a pre-indictment motion of this character ought to be dismissed if the moving party has an otherwise adequate remedy, or cannot show irreparable injury. The thrust of the opinion denying relief was that the court ought not to exercise jurisdiction or grant relief unless there was a clear violation of the claimant's constitutional rights. Judge Churchill held that there was an important question of witness credibility, and he concluded that if a violation of Citron's constitutional rights could be demonstrated it would best be done after an indictment had issued, with the specific charges in the indictment before the reviewing court. Accordingly, in August 3, 1977, he declined to exercise jurisdiction.

On August 17, 1977, Citron was indicted and shortly thereafter refiled the motion for suppression of evidence and the return of business records now before me. By stipulation, the transcript of the hearing before Judge Churchill has been made a part of the record in this case.

II. THE LAW

The discussion of applicable law must necessarily begin with 26 U.S.C. § 7602. It provides in part:

> § 7602. Exaination of books and witnesses
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquriy; ...

Noteworthy is the basic stated statutory purpose:

> ... ascertaining the correctness of any return ... and determining the liability of any person for any internal revenue tax ...

In order for the Internal Revenue Service to carry out this purpose the statute allows an agent "to examine any books, records or other data which may be relevant or material to such inquiry ...." Of course, a revenue agent conducting an investigation under this section must do so within the parameters defined by the Fourth and Fifth Amendments. The Fourth Amendment particularly does not apply only when an individual is suspected of criminal behavior. Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

In a tax fraud case it is often asserted by the taxpayer who is the object of the audit that since he or she does not know of the possible criminal

repercussions, United States v. Stamp, 458 F.2d 759 (D.C. Cir. 1971), cert. denied, 406 U.S. 975, rehearing denied, 409 U.S. 900, involved in a civil tax audit, a Fourth Amendment right is violated if he or she is not fully informed of the purposes of the audit. This is not so.

In this case Citron says that since Engelson suspected Citron of tax fraud or other criminal behavior before conducting the audit, the consent obtained by Engelson to examine Citron's tax books and records was not valid because Citron was informed of these suspicions. He argues that absent this information, the consent is invalid and that the use of such materials so obtained in a subsequent prosecution in turn violates both his Fourth and Fifth Amendment rights.

A civil audit must necessarily begin with an examination of a taxpayer's books and records. Realistically, an audit begins with some suspicion in the mind of a revenue agent, usually a suspicion that the amount of tax reported and paid is not correct and that there may be additional tax liability; such audits are regularly made following consent rountinely obtained and are completely consonant with the objectives and means set forth in 26 U.S.C. § 7602. See United States v. Sclafani, 265 F.2d 408, 415 (2d Cir. 1959):

> The Fourth Amendment does not require more than this, that when his consent is sought the taxpayer be apprised of the government's concern with the accuracy of his reports, and therefore of such hazards as may be incident to a voluntary disclosure. We hold that Sclafani was so apprised by the warning inherent in the request when Agent Sonkin identified himself and disclosed his purpose to audit certain returns of the corporation. (emphasis supplied)

If a revenue agent does suspect tax fraud before he begins his audit, but his purpose is still civil, that is to ascertain whether a correct tax has been reported and whether there is liability for any additional tax, he may conduct an audit having obtained consent so to do without disclosing that he suspects tax fraud. See United States v. Stamp, supra. It is equally clear that he may not induce consent to examine records by trickery or misrepresentation. See United States v. Tweel, 550 F.2d 297 (5th Cir. 1977). In Tweel, taxpayer's accountant called the revenue agent who desired to audit his client's tax returns. The accountant had just been through an audit of prior years' returns with a special agent. To discover whether his client was the object of a criminal tax investigation the accountant asked the agent whether a special agent was

involved in the new investigation. The revenue agent replied that no special agent was involved. This response led the accountant to believe that the revenue agent was simply conducting a civil audit. What the revenue agent did not say was that this audit was being conducted at the special request of the Organized Crime and Racketeering Section of the Department of Justice. The court in Tweel held that the agent's failure to apprise the accountant of the obvious criminal nature of the investigation was deceptive, but quoted with approval, United States v. Prudden, 414 F.2d 1021, 1033 (5th Cir. 1970), cert. denied, 400 U.S. 831 (1970), for this holding:

> We conclude that the mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to

> establish the existence of fraud, and this showing must be clear and convincing. (emphasis supplied)
>
> The court in Prudden also stated that:
>
> Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading. At. p. 1032.

Thus, where there is no legal or moral duty to speak, a revenue agent is not required to advise a taxpayer of his suspicions of the tax fraud. The fact that a taxpayer's returns are under audit is sufficient warning. See United States v. Stribling, 437 F.2d 765, 772 (6th Cir. 1971), cert. denied, 402 U.S. 973, citing with approval, United States v. Squeri, 398 F.2d 785, 788 (2d. Cir. 1968), where the court said:

> [T]he information that a taxpayer's returns are under audit gives sufficient notice of the possibility of criminal prosecution regardless of whether the agents contemplate civil or criminal action when they speak to him.

See also, United States v. Marra, 481 F.2d 1196, 1203 (6th Cir. 1973), cert. denied, 414 U.S. 1114 (quoting Prudden supra, at 1033).

So far this discussion has related to the duty of a revenue agent in obtaining consent who is involved in only one investigation. Where, as here, a revenue agent assigned to do an audit of the defendant's tax returns is also working with a special agent is preparing a criminal tax case against a third person (Peshkopia, with whom Citron had had certain relationships) is the result different?

United States v. Stamp, supra, is informative. In this case evidence obtained in tax audits by revenue agents was permitted to be used in cases resulting in convictions of crimes other than tax crimes. Two lawyers, Leigh and Rogers were partners. Leigh was under criminal tax investigation and for other

suspected criminal activity. He was informed that he was under criminal tax investigation by both the special agent, McElroy, and the revenue agent, Hansell, who were working together as a team. McElroy also wanted to see certain records in the possession of Rogers. To obtain these records he visited Rogers and told him that he (Rogers) was not under investigation. McElroy received the desired records and on subsequent occasions reinterviewed Rogers. One year later Rogers was subjected to an audit. While this was going on, a revenue agent, one Evangelist, was sent to see Reynolds, President of Reynolds Construction Company, to audit his tax returns and his wife's and to obtain all financial transactions between Reynolds and Leigh. McElroy made this request of Evangelist based upon his suspicion that Reynolds had bribed Leigh. Evangelist was given permission to see the books of

Reynolds Construction Company by one, Steele, an accountant and secretary-treasurer of the company. He did not inform Steele of his suspicions. Later Leigh, Rogers and Reynolds were convicted of conspiracy to commit the crimes of false pretences and forgery, and certain other substantive crimes. One of the matters raised on appeal was the denial of motions to suppress evidence which claimed that consent was improperly obtained. The court in Stamp, in a comprehensive statement, of applicable law, held that if revenue agents have valid civil tax audit purposes, even though they tangentially suggest criminal behavior, either tax or non-tax related, they do obtain valid consents to examine books and records, even though they do not disclose their suspicions, provided that such civil tax investigations do not go beyond what is normally sought in civil tax audits.

Stamp is interesting also because of its factual parallel to this case. In the motion to suppress it was claimed that Evangelist, a revenue agent, had informed Steele that his audit of the Reynolds' returns was a "routine" audit. The court readily agreed that if this is what Evangelist had said it would be misleading since the audit's purpose was partly a search for criminal evidence. Having concluded factually that Evangelist did not mislead Steele, the court then considered whether the examination actually conducted was within the permissible scope of a civil tax audit, and it concluded that the materials that were obtained were within the scope of a routine civil audit and thus were not beyond the scope of Steele's consent.

It is clear that a consent from a taxpayer to do a tax audit is valid even though the revenue agent is then working with a special agent on a related case

which may involve criminal tax or non-tax liability, and even though the revenue agent suspects tax fraud or other criminal behavior on the part of the taxpayer provided that his state of mind contains no more suspicion than that and provided he does not mislead the taxpayer through deceptive means. As soon as the revenue agent's suspicions reach the point at which they ripen into an opinion that there may be tax fraud or criminal tax liability, he must refer the case to the Intelligence Division and the taxpayer informed if the investigation is to continue.

Evidence so obtained is validly obtained and may be used in a subsequent prosecution provided such evidence is of the character normally obtained through an examination of books and records

relating to the correctness of a tax return or the liability for additional tax.

III. FACTS

In further evidentiary hearings before me in March, July, and September of 1978, much of the testimony presented to Judge Churchill was repeated. Additional testimony and documentary evidence was introduced and the scope of the hearing broadened.

From all this the following appears: Citron is a lawyer specializing in personal injury and workers' compensation cases. He has acquired business interests both relating to and falling outside his interest in the practice of law. He is a part owner of the building in which his law offices are located. In 1972 he purchased a beauty shop from one Tako Peshkopia (Peshkopia) for whom Citron had acted as an attorney. It was

this professional and business relationship between Citron and Peshkopia that may have led to the IRS's interest in Citron. Peshkopia had apparently been involved in drug trafficking and as a consequence, was indicted on narcotics charges. He pleaded guilty in this court to these charges in April 1973 and was sentenced subsequently to an eight year period of incarceration. Contemporaneous with the narcotics investigation the IRS also investigated Peshkopia for criminal tax evasion. Engelson was assigned to the Peshkopia case along with Special Agent Thomas Kraft.

Engelson learned from the Peshkopia assignment that Citron was Peshkopia's attorney. He also discovered that Citron had purchased the beauty shop from Peshkopia and that the shop's records indicated that, within a six month period (June 1972 through December

1972), sums of money in excess of $220,000 had been deposited in the beauty shop's bank account in the Oakland National Bank, were later withdrawn, and were finally redeposited in Citron's commercial account with the City National Bank. According to the "T-letter" (Government's Exhibit 2), Engelson, "thinging that that these records were tainted or might have stemmed from some narcotics activity," requisitioned Citron's returns for 1970, 1971, and 1972. On September 5, 1973, Engelson telephoned Citron to make an appointment and he began the audit the following day.

For approximately 27 years Citron has been an attorney licensed to practice his profession in Michigan. His offices are located at 2222 Woodward Avenue in Detroit, Michigan. On September 6, 1973, Engelson and Citron met at this office. The men discussed

their mutual background in an apparently amiable fashion. They learned that they shared a common national origin and came from the same ethnic background. This amiability continued during several subsequent meetings. Citron admitted that on the occasions when Engelson was present in his office Engelson asked many questions to which Citron willingly gave answers. Specifically, Citron testified: "I thought that we would have a nice, smooth audit ..." Thus, Citron permitted Engelson full access to all of his records with one condition, to which Engelson acceded, that Engelson not invade the privacy rights of any legal clients or use any information obtained in Citron's audit against those clients. Citron's records were apparently not maintained in any one place in his office. He said that he was a poor record keeper and it was

often necessary for his secretary, Ms. Pat Kowalski, to search for the needed records. Engelson was allowed to remain at Citron's office as long as he pleased to examine records. According to Gerald Gattorn, an associate of Citron's, Engelson frequently remained at the office after everyone else had left for the day; Citron admitted that there were occasions when he left the office with Engelson still there. Apparently, Citron at one time even considered giving Engelson a key to the office; as Gattorn testified, Citron asked "[me] if there was a key I would give him [Engelson]," and "[I said] it was not necessary if he would exit out of the back door." It is clear from this testimony that Engelson was permitted to look at any of Citron's records at Citron's office and to make any copies of those records.

What is not immediately clear is whether Engelson could take business records from Citron's office to his own office in the Federal Building. This factual issue is important. Citron testified that he had given Engelson permission to take only certain peg registers to his office (peg registers were defined as a system of recording information written on checks as carbon copies). Engelson countered that Citron had given him full permission to take specific business records from the Citron office to the Federal Building and that he had done so on two or three occasions. He further stated that on each occasion he sought and received Citron's personal consent. In his motion Citron makes three claims: (1) that Engelson was guilty of misrepresentation and trickery in informing Citron that the investigation was to be

a routine audit; (2) that Engelson took certain records from Citron's office without consent; (3) that contrary to IRS manual procedures, Engelson did not give Citron receipts for the records taken from the office.

In evaluating these claims, the credibility of Engelson and Citron becomes an important issue. Engelson is a revenue agent of some 30 years experience. Undoubtedly over that period he had audited the records of many taxpayers and has adopted an approach calculated to be disarming. The seemingly friendly way in which Engelson and Citron met supports this. Citron, too, is a man of considerable experience, ability, and undoubted savior-faire. The evidence indicates that at the time of the audit he had submitted a net worth statement to a bank showing net assets of $1,389,920. In a material

sense, therefore, he is a successful lawyer and businessman. Citron surely must have known when Engelson first telephoned him and later came to his office to advise him that his returns for 1970, 1971, and 1972 would be subjected to an audit, that his former client Peshkopia faced several serious problems. He also knew that the beauty shop purchased from Peshkopia involved substantial sums of money and that Peshkopia was closely associated with him both professionally and personally. For example, the testimony indicated that on several occasions Peshkopia was observed riding in Citron's automobile.

I must accordingly conclude that, when Engelson called upon Citron, Citron was immediately aware of the personal risks accompanying a tax audit. Notwithstanding this awareness he chose deliberately to disarm Engelson by a

show of friendliness and openness which he solidified by making all of his tax records available to Engelson. He admits that he permitted Engelson to take certain peg registers from the office and allowed him the free reign to his office. That being so, I now find it incredible that Citron was in any way misled (assuming it was said) by Engelson's statement that this was a routine audit though I note that Engelson denies that he characterized the audit in such a fashion. I must conclude that, in any event, Engelson did not misrepresent his purpose. I find it highly unlikely that a lawyer who gave a revenue agent the full run of his office, sought to get him a key for that office, and gave him permission to take records from the office without any restriction as to copying, and who on occasion left while the revenue agent

was still working on records in his office, can credibly maintain that he did not also permit the revenue agent to take other records from the office. While it would have been a prudent course of conduct for Engelson to have given receipts each time he took records from the office, I cannot conclude that his failure to do so means that he had no permission to take these records.

In making my findings I place weight on the fact that both Engelson and Citron appear to be "street wise." Neither appears to be easily misled by what the other would do. Citron matched Engelson's calculately disarming approach with calculated and knowledgeable responses. Each concluded that his own approach would further his own interests. It is equally difficult for me to

believe that Citron did not give his consent to Engelson to take records from the office as it is difficult for me to conclude that Engelson would risk vitiating the entire case by taking records without Citron's consent.

Engelson referred the case to the Intelligence Division on February 15, 1974. What precipitated the referral letter was Engelson's audit which led him to compare client's names for whom Citron had negotiated settlements (and from whom he was therefore entitled to contingent fees) with the cash receipts book. It was noted on February 13, 1974 that some of these fees were not recorded in the cash receipts book. Engelson asked Citron about this. When Engelson return to Citron's office on February 14, Engelson saw that the receipt book had been altered -- names of clients and fee amounts had been added. Engelson

thereupon made the referral and Citron retained tax counsel. It is clear from the record prepared for the evidentiary hearing that Engelson obtained no evidence that Citron was engaged in any non-tax related conduct such as drug trafficking.

I find that when Engelson went to Citron's office as a revenue agent he had two purposes in mind: first, in association with Special Agent Kraft, he was conducting a criminal tax investigation on Peshkopia, and, second, based upon his suspicions that Citron's tax returns might be incorrect, he was conducting a civil tax investigation of Citron.

Having so found, I must now determine whether that dual purpose as Engelson carried it out resulted in a violation of Citron's constitutional rights. Additionally, I must determine

whether Engelson's suspicion that Citron might be engaged in narcotics activity changes the result. Additionally, and in any event, I am required to make findings as to the scope of the consent obtained.

IV. CONCLUSIONS

This is not a summons case. What is involved here is whether or not Engelson engaged in deception or trickery in obtaining Citron's consent to examine his records and to take them from his office. Even so, the teaching of the summons cases is helpful. In United States v. LaSalle National Bank, Crim L. Week 3129, slip opinion 6/19/78, p. 10, the Supreme Court observed that "Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined." See Donaldson v. United States, 400 U.S.

517 (1971); United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973); United States v. Held, 435 F.2d 1361 (6th Cir. 1970). Even though there may be a criminal purpose for the audit, i.e., a suspicion as to tax fraud, the audit is not unreasonable if there is also present the purpose of "ascertaining the correctness of the return" and the determination of liability for (additional) taxes.

I conclude that when Engelson went to Citron's office to audit his returns he had a legitimate purpose to determine their correctness. That he may also have suspected that the tax returns were tainted or that they might not be correct becuase "there might be some narcotics activity" does not make his examination illegal or the consent obtained to look at the records and copy them invalid.

I conclude that he did not engage in trickery or deception in obtaining Citron's consent. No where in this record do I find any such showing by clear and convincing evidence.

I conclude that Engelson acted within the scope of the consent he obtained. The consent carries with it an implied authority to copy documents (counsel for defendant conceded this) and this implication to permit copying, I conclude, also permits copying by mechanical means. In McGarry v. Riley, 363 F.2d 421 (1st Cir. 1966), cert. denied, 385 U.S. 969 (1966), the court stated "it is inconceivable today that a right to examine and copy from voluminous files does not also assume that photostating can be done." Having found that Citron gave Engelson permission to take records from his office I conclude that this permission was in no way

vitiated because Engelson did not give Citron receipts for the records so taken. Finally, I conclude that Citron's Fifth Amendment rights were in no way violated.

Accordingly, Citron's motion to suppress and for return of business records is denied.

An appropriate order may be submitted.

/s/ John Feikens

JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v. Criminal No.

7-80926

ERNEST L. CITRON,

Defendant

_____/

OPINION

On August 17, 1977, Ernest L. Citron (Citron) was charged in a three-count indictment with wilfully attempting to evade and defeat a substantial portion of his and his wife's income tax liabilities for the years 1970 (Count 1), 1971 (Count 2), and 1972 (Count 3), in violation of Title 26, U.S.C., Section 7201. The indictment

alleges that Citron attempted to evade his taxes by filing false and fraudulent income tax returns underreporting his and his wife's joint taxable income and tax liability for each of the years 1970, 1971, and 1972, which allegations he denied.

Following evidentiary hearings before me in March, July and September of 1978*, I denied defendant's motion for suppression of evidence and return of business records in an opinion dated November 29, 1978. A jury trial was waived, and the case was tried before me.

On December 12, 1979, at the close of the government's case in the trial on the merits, I denied defendant's motion for judgement of acquittal under Rule

* The transcript of a pre-indictment hearing in August 1977 before Judge Churchill on Citron's motion to suppress was made part of the record in this case by stipulation.

29(a) of the Federal Rules of Criminal Procedure (F.R.Cr.P.). The defendant presented no evidence at trial except for the elicited on cross-examination. On May 1, 1980, defendant renewed his pretrial motion for suppression of evidence and raised, in the alternative, a motion for rehearing. At the same time defendant also moved for a judgment of acquittal under Rule 29(b), F.R.Cr.P., contending that the government had failed to establish beyond a reasonable doubt that he had violated Section 7201 of the Internal Revenue Code. This opinion follows as required by the Federal Rules of Criminal Procedure.

Citron has been an attorney licensed to practice in Michigan for over 27 years and has an office located at 2222 Woodward Avenue, Detroit, Michigan. During the years in question Citron practiced law under the name

Citron and Citron, and beginning in 1972, Citron, Citron and Weiss, although for income tax purposes the defendant was sole proprietor. Citron reported his own income as that of a sole proprietor and no partnership returns were ever filed by him or on his behalf during the tax years in question. Citron paid legal fees to two attorneys sharing his office space, William Eugene Citron and Gerald Weiss, which fees Citron deducted as expenses on his tax returns. He issued Forms 1099 to William Citron and Weiss each year reflecting these payments.

In the years 1970 through 1972, Citron's legal business consisted primarily of personal injury claims, in addition to some worker's compensation claims, divorce actions, and estate actions. When a claim settled or litigation concluded, Citron received checks payable to the client and himself or to

the client and Citron's firm name, which Citron would negotiate and deposit in City National Bank account number 309-012241 in Detroit, Michigan. He would then remit a portion of the settlement to the client by check. At the conclusion of a case, a settlement sheet indicating the distribution and apportionment of the award was prepared by Citron's secretary and placed in the case folder.

There is evidence that Citron substantially controlled the finances of all his cases, even where other attorneys were involved. Charles Shere, an attorney associated with Citron in the litigation of several cases during the years at issue, testified that contrary to the business custom, Citron distributed funds received for cases referred by Citron to Shere for trial. Isadore Goldbaum, an attorney who shared office space with defendant at 2222 Woodward

Avenue, testified that Citron paid the bills for joint expenses such as telephone service and secretaries.

Citron's financial and business sophistication is evidenced by his extensive banking practice and dealings with brokerage firms. Records of Citron's business bank account indicate that he made deposits and withdrawals of over 14 million in 1970, over 9 million in 1971, and over 18 million in 1972 in a practice known as "check-kiting," which relies on delays in processing checks to create artifical account balances. During 1970, 1971, and 1972, Citron maintained both margin and cash accounts with five brokerage firms.

The case began in September of 1973 when William A. Engelson (Engelson), a revenue agent of the Internal Revenue Service, requisitioned Citron's tax returns for the calendar years 1970, 1971, and 1972, and began an audit. On

January 10, 1974, Engelson began copying by hand Citron's basic business income record, a cash receipts book. At Citron's suggestion, Engelson took the book with him at the end of the day to photocopy it and returned it the following day. On February 13, 1974, Engelson presented Citron with a list of names included in Citron's check registers which has been turned over in September 1973, but which did not appear in the receipts book. Citron stated to Engelson that his receipt book reflected all income received. That evening Citron altered the receipts records adding fees and increasing some fees previously understated. When Engelson noted the changes the next day and asked Citron about them, Citron stated he had lied to Engelson the previous day. Engelson listed the alterations he observed, inspected certain client

folders, and calculated the income in excess of that reported in Citron's 1970, 1971 and 1972 tax returns. On February 15, 1974, Engelson, upon consultation with his supervisor, referred to the case to the IRS Intelligence Division.

The defendant's individual income tax returns for those three years were prepared by Ralph Woronoff, a certified public accountant, from summary totals of income, expenses and deductions, and lists of stock market transactions provided to him by the defendant. Citron would provide his accountant with the yearly totals of the income in the receipts book, plus the yearly retainer he received from Fleisch Sportswear, Inc. The evidence establishes that this information provided to Woronoff, as well as the returns signed and filed by Citron and his wife in 1970, 1971, and 1972 were false and fraudulent.

The procedure followed by agents investigation Citron's records was to obtain copies of items deposited into the law firm bank account for the tax years in question which were payable to clients of the defendant and included the name of Ernest Citron, Citron and Citron, or Citron, Citron and Weiss. The deposits were compared with defendant's cash receipts book to determine which of the checks had the appearance of legal fees to Citron. The makers of the checks, usually insurance companies, were contacted to locate addresses of the payees. Agents met with those claimants to determine the amount of legal fees paid to defendant, if any. Agents also obtained probate court records of cases handled by Citron. Where the amount reportedly paid to Citron was not found in his cash receipts book or was more than the

amount recorded in the book, the difference was deemed unreported taxable income to defendant. After credit for proper deductions, a corrected tax was computed and compared with the taxes paid by defendant. The differences was deemed due and owing.

The government's summary expert, Robert M. Campbell, a revenue agent employed by the Internal Revenue Service, Detroit, Michigan, testified that Citron's income tax returns for 1970, 1971 and 1972 understate his income from his legal practice and from interest received. For 1971 the cash receipts book itself reflects additional income of $45,248.76 not provided to Woronoff and hence not reflected on that year's tax return.

Campbell's analysis of the documents in evidence, the stipulations of the parties, and testimony at trial led

him to conclude that additional amounts of legal income totaling $18,189.78 in 1970, $50,020.81 in 1971, and $52,171.46 in 1972 were not reported in the receipts book or returns. The addition, the government's expert concluded Citron had received and failed to report interest income of $814.21 in 1970, $3,115.80 in 1971, and $1,872.05 in 1972. He determined Citron owed an additional tax of $5,835.48 in 1970, $51,112.37 in 1971 and $24,745.75 in 1972.

Motion to Suppress Evidence, or Alternatively, for a Rehearing

Defendant does not raise any significant additional law or facts in his motion which compel a result difference than the one I reached in my opinion of November 29, 1979. Therefore, I incorporate by reference that earlier opinion

in denying defendant's renewed motion to suppress evidence. In my opinion of November 29, 1979, I concluded that revenue agent Engelson had two purposes in going to Citron's office to audit his tax returns: to conduct a civil tax investigation of Citron and to further the criminal tax investigation of Citron's client, Tako Peshkopia. The fact that Engelson may have also suspected that Citron's records were tainted by evidence of illegal narcotics activity did not make his examination illegal or vitiate defendant's consent to the audit. I also concluded that Engelson did not engage in trickery or deception to obtain Citron's consent and that Engelson acted within the scope of the consent he obtained.

Defendant's reference to trial testimony which pinpoints the date when Engelson's focus shifted from his

suspicion of tainted records to defendant's tax returns adds nothing to my prior ruling. There is an ample basis in the record for finding a duality in Engelson's motive in conducting the audit, and the length of time that the dual purpose existed does not, as defendant suggests, amount to bad faith which negates the existence of the legitimate purpose.

Defendant also makes much of trial testimony regarding the date of assignment of defendant's tax returns to revenue agent Engelson. Defendant argues that trial testimony of Engelson reveals a material misstatement not revealed in pre-trial testimony--namely, that Engelson initially told Citron he had been "assigned" the audit of defendant's returns for 1970, 1971, and 1972. At trial it was determined that only the 1971 tax return had been

assigned to Engelson prior to his first visit to Citron's office. Engelson testified that the other returns had been "requisitioned" and he had been "awaiting the assignment" at the time the audit began. Even though Engelson admits he may have "misused the term assigned," I do not find this was a material misrepresentation or one that effectively tricked the defendant. Defendant suggests that Engelson's purpose was to deceive the defendant into thinking that his inquiry was in the nature of a routine audit. Insofar as Citron was an experienced attorney he must have been aware of the potential criminal aspects of any tax audit. Moreover, Citron was certainly not deceived as to the assignment of the 1972 return since at the start of the audit Citron had not yet filed that return. Defendant does not make a clear showing that he was tricked or deceived

by Engelson's comment that he had been assigned the audit of all three returns. See, United States v. Nuth, 605 F.2d 229 (6th Cir. 1979).

Defendant's rehearing motion requests a reopening of the record to ask seven questions of Engelson's supervisor, Ted Eckhardt, regarding any role he may have had in initiating the audit of defendant's tax returns. Eckhardt's testimony is not crucial to the outcome of the case. Engelson's underlying purpose, which included a legitimate motive in conducting the audit, will remain the same regardless of Eckhardt's testimony. Consequently, defendant's motion for a rehearing is denied.

Motion for Judgment of Acquittal

Citron has been charged with violating Section 7201 of the Internal Revenue Code of 1954, which provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution.

To sustain a conviction for willful attempted evasion of income taxes, the government must establish as to each count that there was a substantial tax due and owing, that the defendant attempted to evade this income tax, and that the attempted evasion was willful. See, Sansone v. United States, 380 U.S. 343, 351 (1965; Spies v. United States, 317 U.S. 492 (1943).

Defendant's motion for judgment of acquittal is based on his contention that the government did not establish his guilt beyond a reasonable doubt because it failed to establish that unreported income was attributable

solely to Citron. Defendant suggests that the government's failure to follow exculpatory leads leaves the court with the reasonable alternate probability that the income is, at least in part, allocable to the two other attorneys associated in a partnership with Ernest Citron -- William Citron and Gerald Weiss.

Defendant misstates the nature of the government's proof by calling it a bank deposit analysis. The government used at trial, as it indicated in its trial brief, a specific items method of proof. Stipulations were entered by the government and defendant which detailed amounts received by defendant and amounts remitted to clients from settlements or completed litigation. The government's summary sheet admitted into evidence sets forth the specific items of income it was relying on in its determination that defendant received

income in excess of that reported in 1970, 1971 and 1972.

Since it did not employ a circumstantial method of proving unreported income, the government is not obligated in this case to negate taxable leads. United States v. Suskin, 450 F.2d 596, 598 (2nd Cir. 1971); United States v. Shavin, 320 F.2d 308, 311 (7th Cir. 1963), cert. denied, 375 U.S. 944 (1963); Swallow v. United States, 307 F.2d 81 (10th Cir. 1962), cert. denied, 371 U.S. 950 (1963). Once the government has demonstrated unreported receipts having the appearance of income, the burden is on the defendant to explain the receipts and he remains silent at his peril. United States v. Hiett, 581 F.2d 1199, 1202 (5th Cir. 1978); United States v. Slut sky, 487 F.2d 832, 842 (2nd Cir. 1973) cert. denied, 416 U.S. 937 (1974) United States v. Lacob, 416

F.2d 756, 760 (7th Cir. 1969), cert. denied, 396 U.S. 1059 (1970).

I wish to emphasize, as the court did in United States v. Hiett, supra, at 1202, that this holding in no way shifts the burden of proof to the defendant. He is not required to testify in court or to supply leads. The burden of establishing all elements of the offense, including the taxable source, remains on the government throughout the trial. However, once the government has established a prima facie case, the defendant by remaining silent assumes the risk that the trier of fact will believe the government's witnesses and find him guilty. Id.

The evidence in this case leads to a conclusion that the government has established beyond a reasonable doubt that Ernest L. Citron had additional taxable income in the years 1970, 1971 and 1972; that he filed false income tax

returns understating his taxable income and tax due and owing for each year; and that such actions were willful.

There is sufficient evidence in this case to prove that the checks at issue payable to Citron and Citron, or Citron, Citron and Weiss were income to Ernest Citron, and not allocable to his partners. The record shows that Citron substantially controlled the bank account into which the business checks were deposited. One of his partners, Gerald Weiss, was not even authorized to issue checks on the firm's bank account. More importantly, no partnership tax returns were filed for the years in question, and Citron claimed payments to his partners as deductions on his personal income tax returns for 1970, 1971 and 1972. The tax returns of Weiss and William Citron for those years correspondingly reflect these payments as

income. As Engelson testified, defendant himself represented that funds given to William Citron and Gerald Weiss in excess of those listed on Forms 1099 for the years in question constituted loans. The evidence establishes beyond a reasonable doubt that the unreported income the government ascertained by the specific items method of proof was solely attributable to defendant, and that because of his actions of altering his cash receipts book on the evening of February 13, 1974, his exclusion of income on his tax returns was willful. Defendant remains silent at his peril.

Based on the evidence as described above, I find that the defendant is guilty as charged of willfully attempting to evade a substantial portion of his income tax for the years 1970, 1971, and 1972.

An order denying defendant's motion for suppression of evidence or for a

rehearing, and denying his motion for a judgment of acquittal, is entered herewith.

/s/ John Feikens

JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHER DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v. CRIMINAL NO. 7-80926

ERNEST L. CITRON,

Defendant

---/

ORDER

At a session of said Court held in the Federal Building at Detroit on the 19th day of June, 1980

PRESENT: THE HONORABLE JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

In accordance with the accompanying opinion, and based on the findings of fact and the reasons set forth therein, I find the defendant guilty as charged of willfully attempting to evade a substantial portion of his income tax due and owing for the years 1970, 1971 and 1972, and

IT IS ORDERED that defendant's motion for suppression of evidence or for a rehearing, and his motion for a judgment of acquittal, be, and the same hereby are, DENIED.

/s/ John Feikens

JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

No. 80-1670

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
ERNEST L. CITRON,	)	
Defendant-Appellant.	)	

Before: EDWARDS & KENNEDY, Circuit Judges, CELEBREZZE, Senior Circuit Judge.

Ernest Citron appeals from his conviction by the district court on three counts of willfully attempting to evade federal income taxes in violation of 26 U.S.C. Sec. 7201. At trial the government demonstrated that appellant,

an attorney, had intentionally understated his income from legal fees for the years 1970, 1971, and 1972. This was established through the introduction of photocopies of appellant's business records which had been made by an IRS Agent, allegedly with appellant's consent.

In 1973, Agent Engelson of the Internal Revenue Service was participating in a tax investigation of Tako Peshkopia, a suspected narcotics trafficker. In the course of the Peshkopia assignment, Engelson learned that Peshkopia was a client of appellant's, and that appellant had purchased a beauty shop from Peshkopia . The beauty shop's records indicated that within a six month period in 1972, sums in excess of $220,000 were deposited in the shop's account, withdrawn, and redeposited in the appellant's law firm account. Suspicious of this activity, Agent

Engelson met the appellant at his law office. Engelson informed appellant that he was assigned to audit appellant's tax returns, but did not inform him of the nature of the interest.

The audit process proceeded amicably, and appellant provided Engelson with access to the records in the firm. Engelson was hand-copying some of those records, but apparently appellant suggested that the Agent take the records with him and photocopy them. Appellant later asserted that he had only given the Agent permission to take certain check registers, but that Engelson took many records, such as his cash receipts. Engelson made photocopies of all the records, and it was the introduction of those records which appellant asserts constitutes reversible error. Specifically, appellant argues that the records were removed without his consent; that even if consent were given,

it was obtained by fraud and deceit; and that even if the consent was legitimately obtained, the entire investigation was in violation of IRS regulations. These contentions are without merit.

The district court conducted a hearing after which it concluded that appellant had voluntarily consented to the removal of the records. We see no basis for holding this finding to be clearly erroneous. We must also reject appellant's assertion that his consent was induced by fraud, as our review of the record reveals no affirmative misrepresentations as are required by our decision in United States v. Stribling, 437 F.2d 765 (6th Cir. 1971). Finally, even if the audit here was commenced in technical violation of IRS regulations, that procedural irregularity alone does not afford the defendant any right to suppression of the evidence. See United

States v. Cacares, 440 U.S. 741 (1979).

We have examined the other issues raised by appellant and find them to be without merit. The decision of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

April 28, 1981

Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2208

In the Supreme Court of the United States

OCTOBER TERM, 1980

ERNEST L. CITRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's finding that an IRS Agent properly initiated and conducted a civil audit of petitioner's tax records was clearly erroneous.

2. Whether the district court's finding that petitioner was not deceived into consenting to a search of his records was clearly erroneous.

3. Whether the district court abused its discretion in denying a motion for rehearing in order to allow petitioner to examine an additional witness.

4. Whether the district court's finding that petitioner consented to the removal of all relevant files from his business office was clearly erroneous.

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In the Supreme Court of the United States

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ERNEST L. CITRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court denying petitioner's motion to suppress evidence and for judgment of acquittal (Pet. App. 1-32) is not reported. The opinion of the district court denying petitioner's motion for rehearing (Pet. App. 33-56) is not reported. The order of the court of appeals (Pet. App. 57-61) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1981. The petition for a writ of certiorari was filed June 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of wilfully attempting to evade his

federal income taxes for the years 1970, 1971, and 1972, in violation of 26 U.S.C. 7201 (Pet. App. 33-56). He was sentenced to concurrent two-year terms of imprisonment on each count, with all but six months of each term suspended, to be followed by two years' probation at the conclusion of his incarceration.

The pertinent facts, as reflected in the opinions below, were as follows. In September 1973, William A. Engelson, a revenue agent of the Internal Revenue Service, requisitioned and audited petitioner's tax returns for the calendar years 1970, 1971, and 1972 (Pet. App. 2). Prior to September 1973, Engelson had been assigned with a special agent to investigate possible criminal tax evasion by Tako Peshkopia, for whom petitioner had served as an attorney (Pet. App. 17). Based on the Peshkopia investigation, Engelson learned that petitioner had business dealings with Peshkopia involving substantial sums of money. It was the suspicion created by those business dealings that motivated Engelson to investigate petitioner's tax returns (Pet. App. 18-19).

Petitioner has been a licensed attorney in the State of Michigan for 27 years and has extensive business interests outside of the practice of law (Pet. App. 17, 19). The district court characterized him as "a man of considerable experience, ability, and undoubted *savior-faire*" (Pet. App. 23). On September 6, 1973, Engelson met petitioner at his law office and discussed the audit. The meeting apparently was amicable, and petitioner agreed to cooperate fully with the audit (Pet. App. 19-20). Petitioner allowed Engelson to go through the office freely, attempted to get a key for him, and even allowed him to stay in the office when no one else was around (Pet. App. 20-21). Petitioner testified that he had given Engelson permission to remove at least some records from the office and copy them (Pet. App. 22).

Engelson's audit consisted largely of comparing petitioner's law practice records of receipts for settled cases with "peg registers," which were petitioner's system of recording checks. Engelson took both the records[1] and the peg register to his office and copied them. He noticed significant discrepancies between these sets of records, confronted petitioner with them, and left the records with petitioner to allow him an opportunity to explain the problem (Pet. App. 39). Overnight, the receipts records were altered (*ibid.*). Engelson then referred the case to the Intelligence Division of the IRS.

Prior to trial, petitioner moved to suppress the business records that Engelson had copied on the grounds that the entire investigation was improperly motivated, that petitioner's consent to copy any records had been obtained through fraud and trickery by Engelson, and that, in any event, petitioner consented only to the copying of the peg register and not his receipts book.

After numerous pretrial hearings,[2] the district court held that Engelson's investigation was motivated in part by his suspicions that petitioner's tax returns might be incorrect, which was sufficient to justify a civil tax investigation (Pet.

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[1]Engelson did not, however, give petitioner a receipt for these records as provided in the Internal Revenue Manual (Pet. App. 23, 26). The reason for this failure is not clear. Engelson testified that he regarded the requirement as discretionary (Pet. 58). The district court apparently credited this explanation because it found that the failure did not mean that petitioner had refused to grant permission to take the records (Pet. App. 26).

[2]Prior to his indictment, petitioner had filed a motion seeking to have his business records returned and to enjoin further prosecution (Pet. App. 3). After two days of hearings, these motions were denied on the ground that the district court lacked jurisdiction over petitioner's claim, since there was an adequate remedy if an indictment issued (Pet. App. 4). The transcript of that hearing was made a part of the record in this case (Pet. App. 5).

App. 28). The district court also held that petitioner had failed to show that Engelson engaged in trickery or deceit in obtaining petitioner's consent to copy his business records (Pet. App. 31). Finally, the district court held that petitioner had consented to allowing Engelson to remove all relevant material, including the receipts records (Pet. App. 26).

A bench trial was held and the district court found petitioner guilty on all three counts of tax evasion. The court also denied petitioner's motion for rehearing (Pet. App. 53-54), finding it unnecessary to allow petitioner to examine Engelson's supervisor at the IRS to ascertain his role in instituting the investigation (Pet. App. 47). The court reasoned that it already was clear that Engelson had a proper motive in investigating petitioner, and thus his supervisor's role in the assignment process would add nothing (*ibid.*).

The court of appeals affirmed (Pet. App. 57-61). It held that the district court's findings on the scope of petitioner's consent and whether it had been obtained through deceit were not "clearly erroneous" (Pet. App. 60). It also ruled that it had examined "the other issues raised" by petitioner and found "them to be without merit" (Pet. App. 61).

ARGUMENT

1. Petitioner first contends (Pet. 21-33) that the entire investigation of his taxes was illegal because it was conducted without a proper civil tax investigation purpose and without "supervisory justification" (Pet. 31-32). Petitioner reasons that since his investigation arose out of the separate investigation into the narcotics and tax evasion activities of Peshkopia, the purpose for the investigation of petitioner was solely to further a non-tax, criminal investigation, in violation of 26 U.S.C. 7602.

The issue is a factual one that was properly decided against petitioner by the district court in its finding "that when Engelson went to [petitioner's] office to audit his

returns he had a legitimate purpose to determine their correctness" (Pet. App. 30). The finding was amply supported first by the fact that Engelson knew that petitioner had engaged in business transactions involving substantial sums of money with a suspected criminal, and therefore it was possible that petitioner had not declared all of his income. Second, Engelson's investigation, which was almost exclusively a review of petitioner's receipts and expenditures in his law practice to determine whether they corresponded to his tax returns, was fully consistent with a limited civil tax investigation. The court of appeals correctly held that the district court's finding was not clearly erroneous.

Petitioner's related concern that there was inadequate supervision of Engelson's motive for the investigation is both factually inaccurate and legally irrelevant. The only evidence shows that the agent's requisitions for the petitioner's tax returns were approved by his supervisor and that the audit of petitioner was officially assigned to him by his Internal Revenue Service superiors (Pet. App. 46). Moreover, petitioner cites nothing that requires a supervisor to review an agent's motive for initiating an investigation. See generally I Audit, CCH Internal Revenue Manual para. 4175.12 at 7118-7119. The district court's conclusion that the agent's motive was legitimate is sufficient to put to rest any claim of inadequate supervision.

2. Petitioner's second argument is that his consent to removal of his records was obtained through fraud and deception. Petitioner asserts that Engelson had a duty to disclose his suspicion that petitioner may have been connected with the illegal activities of Peshkopia and that the failure to disclose the basis for the inquiry misled petitioner into granting his consent.

First, we note that petitioner does not allege any "affirmative act" of misrepresentation, which has been regarded by the courts of appeals, including the Sixth Circuit in this

case (Pet. App. 60), as a necessary predicate to a finding of fraud in a tax audit situation. See *United States* v. *Nuth*, 605 F. 2d 229, 234 (6th Cir. 1979); *United States* v. *Marra*, 481 F. 2d 1196, 1203 (6th Cir.), cert. denied, 414 U.S. 1004 (1973); *United States* v. *Stribling*, 437 F. 2d 765, 772 (6th Cir.), cert. denied, 402 U.S. 973 (1971); *United States* v. *Prudden*, 424 F. 2d 1021, 1032 (5th Cir.), cert. denied, 400 U.S. 831 (1970). An agent's silence can constitute fraud only "where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading." *United States* v. *Prudden, supra*, 424 F. 2d at 1032. Agent Engelson was under no duty to disclose his mere suspicions about petitioner's possible criminal activity. See *United States* v. *Marra, supra*, 481 F. 2d at 1203; *United States* v. *Stamp*, 458 F. 2d 759, 780 (D.C. Cir. 1971), cert. denied, 406 U.S. 975 (1972); *United States* v. *Stribling, supra*, 437 F. 2d at 773; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 421 (3d Cir. 1970), cert. denied, 400 U.S. 1021 (1971); *United States* v. *Prudden, supra*, 424 F. 2d at 1033. Moreover, the district court correctly found (Pet. App. 23-27) that petitioner, as an experienced lawyer and businessman, realized the implications of the audit and therefore was not misled by Engelson's failure to disclose all of the leads that caused him to initiate the investigation. See *United States* v. *Nuth, supra*, 605 F. 2d at 234; *United States* v. *Stamp, supra*, 458 F. 2d at 780; *United States* v. *Prudden, supra*, 424 F. 2d at 1035. Accordingly, the district court and the court of appeals correctly found that petitioner's consent to the search of his records was properly obtained in this case.

3. Petitioner next argues (Pet. 47-54) that the district court should have reopened the suppression hearing after the trial to allow him to examine Engelson's supervisor with regard to his role in initiating petitioner's tax audit. Petitioner justifies the tardiness of his request by asserting that

he was surprised at trial to learn that Engelson's decision to audit had been approved by his supervisor.

The district court did not abuse its discretion in declining to reopen the case after trial. First, it is difficult to believe that petitioner really was surprised to learn that a supervisor had approved Engelson's decision to initiate the investigation. Second, the likelihood that the supervisor had any additional information not obtained by petitioner after the numerous previous hearings was very small. Finally, the evidence fully supported a determination that Engelson initiated the audit process with a proper civil tax investigation motive. The district court properly recognized that nothing his supervisor could say was sufficiently likely to affect that conclusion to justify the unusual step of reopening the suppression motion hearing (Pet. App. 47).

4. Finally, petitioner argues (Pet. 55-61) that, even if he did consent to Engelson's examination of some of his peg registers, his consent did not extend to allowing Engelson to copy his receipts records. The district court rejected this fact-bound claim, finding

> it highly unlikely that a lawyer who gave a revenue agent the full run of his office, sought to get him a key for that office, and gave him permission to take records from the office without any restriction as to copying, and who on occasion left while the revenue agent was still working on records in his office, can credibly maintain that he did not also permit the revenue agent to take other records from the office.

(Pet. App. 25-26).

Petitioner attempts to overturn these findings by arguing that they ignore the crucial fact that Engelson failed to give petitioner a receipt for those records. In light of the overall informal atmosphere surrounding the audit, however, it

hardly seems surprising that Engelson failed to give petitioner a receipt for all of the records he removed from the office.

The district court's factual determination regarding the scope of consent, affirmed by the court of appeals, was correct and warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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